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April 21, 1992

APR 21 1992

Federal Communications Commission
Office of the Secretary

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Ms Searcy:

Re: *CC Docket No. 92-26 - Amendment of Rules Governing Procedures to be Followed
When Formal Complaints Are Filed Against Common Carriers*

On behalf of Pacific Bell and Nevada Bell, please find enclosed an original and six copies of its "Comments" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,



Enclosures

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APR 21 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Amendment of Rules Governing) CC Docket No. 92-26
Procedures to Be Followed When)
Formal Complaints Are Filed Against)
Common Carriers.)
_____)

COMMENTS OF PACIFIC BELL AND NEVADA BELL

Pacific Bell and Nevada Bell (the "Pacific Companies")
file these comments in response to the Commission's Notice of
Proposed Rulemaking ("NPRM") in the above captioned proceeding.
The Commission has suggested various changes in the procedures
used to handle formal complaint proceedings brought under
Section 208 of the Communications Act of 1934, 47 U.S.C. 208.

I. Motion Practice

The Commission has proposed that motions for summary
judgment or dismissal must be filed with the answer, unless it is
based on information discovered after filing of the answer.¹
Requiring the filing of summary judgment motions at the time of
filing the answer is unduly burdensome since it requires, in the
space of 20 days (under the Commission's proposed rule), for a
defendant to file an answer and get the necessary documentation

¹ NPRM at para. 11.

together to make a summary judgment motion. Summary judgment motions are traditionally filed after discovery has been conducted and are based on affidavits, deposition testimony and other evidence. Summary judgment motions are granted if there is no genuine issue as to material facts.² The Pacific Companies suggest that a better rule would be to require a summary judgment motion be filed anytime before the expiration of 30 days after answers to interrogatories are due. If a party wants to file after that time, the summary judgment motion must be based, at least in part, on information discovered after that date. The Commission could impose the same restrictions as are set forth in the proposed rule requiring the party to specify the particular information and the occasion of its discovery.

The NPRM also proposed that replies to oppositions to motions not be allowed.³ The Pacific Companies do not believe that this is appropriate. The moving party bears the burden of persuasion for the motion. Therefore, that party should be allowed to respond to the concerns and arguments raised by the opposing party. Since the time period currently allowed for filing replies is 5 days after oppositions are to be filed (47 C.F.R. 1.45), retention of this rule will not serve to unreasonably delay the proceedings. Further, the Pacific Companies suggest that the Commission could limit the

² Fed. Rule Civ. Proc. 56.

³ NPRM at para. 11.

reply to address only those matters raised in the opposition to the motion.

II. Discovery

The Commission has proposed that all proceedings be bifurcated for discovery purposes. The Commission states that it believes a significant amount of discovery centers around "developing facts that would prove or disprove injury or damages incurred as a consequence of a violation of the Communications Act or Commission requirement."⁴ The Commission notes that if a violation is not found, such discovery is "effectively wasted."⁵ The Commission evidently uses the terms "injury" and "damages" interchangeably. However, each of these terms has different legal meanings. Injury is an element of many causes of action. It is connected to causation. Section 206 of the Communications Act states that carriers are liable for damages in complaint proceedings only to "the person or persons injured thereby". Also, section 202 requires a complainant alleging discrimination to present a prima facie case of injury as a result of asserted rate discrimination.⁶

Therefore, injury needs to be separated from a discussion on damages. Under the Commission's proposed rules,

⁴ NPRM at para. 13.

⁵ Id.

⁶ Illinois Bell Telephone Company v. AT&T, et al, 4 FCC Rcd 5268.

damages are to be examined only after a finding of liability. The Pacific Companies do not object to bifurcating cases in this manner. However, intimately connected to the concept of a violation is the issue of causation. Discovery as to causation of some injury should be allowed prior to a finding of a violation. While section 208 states that "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant," this section does not change the rule that some causation must be shown by the complainant for many causes of action. And, discovery as to that causation should be allowed prior to the second phase of the bifurcated proceeding. Thus, the Commission should clearly state that the second phase of the proceeding will only deal with the amount of compensatory damages, and that injury or causation issues should continue to be addressed in the liability phase of the proceeding.

The Commission has also proposed that objections to the breadth of discovery be filed with 10 days of service of the discovery request, with answers and any other objections due within 20 days.⁷ The Pacific Companies believe that no benefit will accrue from this rule, and that it imposes undue burden on the responding party. Requiring an additional filing based on only one type of objection, to be due while a company is trying to comply with a discovery request seems burdensome and oppressive. A 20 day time frame for responding to interrogatories is extremely difficult. Given the nature of most

⁷ NPRM at para. 14.

interrogatories, which require much information to be collected from many sources in the business, it would be unwieldy for that company to make a separate earlier filing based on only one objection. And, filing such an objection would not speed the process of resolving the complaint since the complainant would likely want to examine the information submitted in the answers in order to determine whether to pursue a motion to compel on the objection.

Also, the Commission seeks comment on precluding use of the relevance objection as a ground for opposing an interrogatory or document request.⁸ The Pacific Companies vigorously oppose this proposal. The Commission suggests that if a party believes an interrogatory is irrelevant, it can simply not answer it and, even though it will be deemed admitted, the party will suffer no harm if it is truly irrelevant to the subject matter. However, no party will want to take the chance that the Commission may disagree with its analysis and decide that the question was relevant. Therefore, by imposing this rule the Commission would effectively negate any opportunity to ever challenge the information sought from the requesting party. Not only does this proposal not pass muster, it may also be violative of a party's due process rights.

⁸ NPRM at para. 15.

III. Proprietary Information

The Pacific Companies support the new rules as to the discovery of proprietary information and its use in written submissions to the Commission.⁹

IV. Briefs

The Commission has proposed that the staff be given the discretion to require briefs, but that reply briefs should only be allowed in cases where discovery has been conducted.¹⁰ The Pacific Companies believe that the Commission should always require parties to submit briefs before the Commission undertakes consideration of the matter. Currently, there is no mechanism in the rules as to when a matter is deemed submitted to the Commission. If the rules required that parties will submit the cause to the Commission upon briefs, unless the parties and the Commission agree otherwise, then the parties will always be aware when the Commission will be addressing the issues. The parties can then be sure to communicate all outstanding facts, evidence and arguments to the Commission, before consideration of the merits of the case.

As to reply briefs, the Pacific Companies believe reply briefs are necessary so that each party can refute or explain issues raised by the opposing party. The Commission proposes

⁹ NPRM at para. 17.

¹⁰ NPRM at para. 9.

that no reply briefs be allowed if discovery has not been conducted.¹¹ However, those cases may especially benefit from reply briefs since the parties may not be fully aware of the opposing party's arguments and facts since extensive discovery was not conducted.

V. General

Finally, the Commission seeks comment on other revisions that might assist the Commission in timely resolution of Complaint cases. The Pacific Companies suggest that the Commission add a section to the rules allowing certain complaint cases to be handled via an evidentiary hearing. The Commission notes that it retains discretion to designate cases for evidentiary hearings before an Administrative Law Judge ("ALJ") after liability has been decided. However, the liability phase of the proceeding may also require evidentiary hearings. Not all complaint cases have straightforward facts. Some cases require credibility determinations which cannot occur in paper submissions to the staff. For example, a complainant may allege that a carrier made certain statements (that would lead to a finding of liability) whereas the carrier may contend that no such statements were made. Written affidavits, or even depositions, would not be helpful in resolving this matter. Resolution of this issue would need to be based on a credibility determination of the individuals involved. Live hearings, where

¹¹ NPRM at para. 9

a fact finder could see the individuals and make judgments as to the truth, would be necessary.

The Pacific Companies suggest that the Commission allow a party to move for an ALJ to be assigned to the liability phase of a complaint case if a party can show, or the Commission believes, that key issues of fact are in issue. Those cases should be assigned for hearing by an ALJ so that a formal evidentiary hearing can occur.

VI. Conclusion

The Pacific Companies support the Commission's efforts to streamline the complaint process. Many of the proposals set forth in the NPRM will require parties to submit matters quickly to the Commission. However, fairness and equity require that parties be accorded certain rights, such as the right to reply to

oppositions, and to submit briefs and reply briefs outlining positions.

Respectfully submitted,

PACIFIC BELL
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